

SETTING ASIDE ARBITRAL AWARDS IN MODEL LAW JURISDICTIONS: THE SINGAPORE APPROACH FROM A GERMAN PERSPECTIVE

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I. Introduction

“Fair speech may hide a foul heart.”
Samwise Gamgee in JRR Tolkien’s *The Lord of the Rings*¹

In the past few years, Singapore’s national courts have observed a rising number of applications to set aside arbitral awards on grounds of alleged procedural irregularities. In particular, parties invoke a breach of the rules of natural justice and/or an excess of jurisdiction by the arbitral tribunal. They argue that the arbitral tribunal has not sufficiently considered their arguments or that it has engaged with issues the parties had never submitted to it. However, what they really seem to be after is a state court review of the substantive portions of the award. They re-characterize the case they unsuccessfully argued in the arbitration as procedural challenges before the Singaporean courts in the hopes of achieving a set aside of the arbitral award. In the Tolkien universe,² such disguise of one’s true intentions would be associated with the saying that “fair speech may hide a foul heart”. For the purposes of this article, these set aside applications shall be called “Trojan horse challenges”.

Trojan horse challenges can create considerable problems for the Singaporean courts. They frequently note the increasing difficulty and lengths to which they have to go in order to discern meritorious from unmeritorious challenges.³ The ensuing conundrum the courts see themselves faced with was articulated in *BLB v BLC*:

On one hand, the supervisory function of the court requires it to step in to provide relief in cases of genuine challenges. On the

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¹ JRR Tolkien, *The Two Towers* (George Allen & Unwin, 1954) Chapter 5.

² References to the works of JRR Tolkien play a special role in the Singaporean judgement this article is based on. See below at III. 1. p. 10.

³ See e.g. *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* (“TMM Division”), [2013] SGHC 186, para 2: “Unfortunately [...] sieving out the genuine challenges from those which are effectively appeals on the merits is not easy under the present law”.

other hand, the linked principles of minimal curial intervention and finality in proceedings demand that this power of intervention be exercised warily and only in meritorious cases where statutorily prescribed grounds for setting aside have been established.⁴

In order to discern whether these grounds have been established, the Singaporean courts examine the conduct of the arbitral proceedings. The court in *BLB v BLC* has stated that in this process “some degree of review was required”.⁵ But care is in order when delving into a scrutiny of the arbitral proceedings. The review the court in *BLB v BLC* conducted was so comprehensive that its decision was later overturned by the Singapore Court of Appeal.⁶ Indeed, in another case, the practice of “over-jealous scrutiny” by the courts was seen to encourage parties

to, via the statutorily permitted mechanism of curial recourse, tactically frustrate and delay the enforcement of the arbitral award. [...] This runs contrary to one of the original aims of arbitration as an expedient alternative dispute resolution mechanism.⁷

Hence, if the courts open the gates for the proverbial Trojan horse to enter, they end up conducting an impermissible review on the merits of the award and endanger the efficiency of arbitration.⁸ But is it better to keep the gates shut without inspecting a possibly meritorious set aside application more closely? At the end of the day, this conundrum leads to the question of how much state court interference is desirable in the arbitral process.

International arbitration is often characterized as a transnational dispute resolution mechanism.⁹ Indeed, some aspire international arbitration to become an entirely autonomous system that is based solely on party autonomy and some international instruments, which are uniformly applied around the globe.¹⁰ Still, arbitration cannot operate in a complete legal

⁴ *BLB and another v BLC and others* (“*BLB v BLC*”), [2013] SGHC 196, para 2.

⁵ *BLB v BLC*, para 36.

⁶ Cf. *BLC and others v BLB and another* (“*BLC v BLB*”), [2014] SGCA 40, para 53.

⁷ *TMM Division*, para 126.

⁸ Shaun Lee, ‘Setting Aside Arbitral Awards in Singapore: A Problem in the Standard of Review?’ <<http://singaporeinternationalarbitration.com/2013/10/21/setting-aside-arbitral-awards-in-singapore-a-problem-in-the-standard-of-review/>> (accessed 14 June 2015) focuses on this latter problem of a lack of efficiency.

⁹ See e.g. Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) 2.

¹⁰ Cf. Giuditta Cordero-Moss, ‘International Arbitration Is Not Only International’ in Giuditta Cordero-Moss (ed), *International Commercial Arbitration: Different Forms and Their Features* (Cambridge University Press, 2013) 7, 7.

vacuum.¹¹ At the very least, parties need state court support when it comes to the enforcement of an award. An instrument that combines both aspects is the UNCITRAL Model Law on International Commercial Arbitration (Model Law, ML).¹² On the one hand, it serves as the basis for national arbitration legislation in almost 70 states and close to 100 jurisdictions,¹³ thereby immensely contributing to the harmonization and unification of international arbitration law. On the other, support and interference by national courts is still heavily interwoven in the Model Law's framework.¹⁴ This aspect of a "localization" of the arbitral process becomes particularly apparent when the Model Law's framework is transposed into national legislation and interpreted by state courts. Here, the application of the Model Law's provisions can differ significantly. When problems regarding this application arise a comparison with the approach of other Model Law jurisdictions can be helpful.

Two prime examples of such Model Law jurisdictions are Singapore and Germany. Singapore, which has adopted the Model Law almost verbatim, was faced with a possible Trojan horse challenge in the recent case of *AKN and another v ALC and others and other appeals* ("*AKN v ALC*").¹⁵ In dealing with this challenge, the Court of Appeal restated Singapore's approach to the Model Law's set aside provisions, addressed "the proper relationship between arbitral tribunals and the courts",¹⁶ and explicitly warned the courts of parties employing Trojan horse challenges.

Germany is one of the major civil law jurisdictions that have adopted the Model Law. It has its own interpretation of the Model Law's set aside provisions, which in some regards differs from the Singapore approach. As one Singaporean court has already complained that the Model Law is not well suited to efficiently deal with Trojan horse challenges,¹⁷ the Court of Appeal's handling of such challenges in *AKN v ALC* gives reason to

¹¹ Loukas Mistelis, 'Delocalization and Its Relevance in Post-Award Review' in Frédéric Bachand and Fabien Gélinas (eds), *The UNCITRAL Model Law After Twenty-Five Years* (Juris, 2013) 167, 174.

¹² UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> (accessed 14 June 2015).

¹³ <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> (accessed 14 June 2015).

¹⁴ Klaus Reichert, 'Courts and Arbitration: Forming Choices for Young Lawyers' in Jacques Werner and Arif Hyder Ali (eds), *A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought* (CMP Publishing, 2009) 221, 224 et seqq.

¹⁵ [2015] SGCA 18.

¹⁶ *AKN v ALC*, para 1.

¹⁷ See above n 3.

evaluate Singapore's approach to setting aside arbitral awards from a German perspective.¹⁸

In the process of this evaluation, this article will first address Singapore's arbitration regime, focussing on the relationship between the courts and arbitral tribunals in general, and the set aside provisions employed for Trojan horse challenges in particular. It will then move on to the decision and reasoning in *AKN v ALC* and point out where problems in connection with Trojan horse challenges arose. A comparison with the German understanding of the role of state courts and their interpretation of the Model Law's set-aside provisions shall then serve to determine how German courts would address Trojan horse challenges. Finally, the results gleaned from this evaluation will be assessed and an appropriate approach to Trojan horse challenges will be proposed.

II. The Arbitration Regime in Singapore

The law governing international arbitrations in Singapore is the International Arbitration Act (IAA).¹⁹ Sec. 3 (1) IAA provides for the Model Law to "have the force of law in Singapore".²⁰ Hence, Art. 34 ML, regarding the set-aside of arbitral awards, applies verbatim. However, the grounds for setting aside an award are not limited to those listed in Art. 34 (2) ML. Rather, they are supplemented by Sec. 24 IAA which provides that awards may also be set aside if the arbitrators have been influenced by fraud or corruption (Sec. 24 (a) IAA) or if the award has been rendered in breach of the rules of natural justice (Sec. 24 (b) IAA).

The two set aside grounds usually used in Trojan horse challenges are Sec. 24 (b) IAA and Art. 34 (2) (a) (iii) ML, which refers to an excess of the tribunal's authority. As these grounds were also asserted in *AKN v ALC*, they shall be of particular interest in the following. But before, it is worthwhile to point out Singapore's approach to the relationship between courts and arbitral tribunals.

1. Singapore's approach to the relationship between courts and arbitral tribunals

Naturally, the role state courts play in the arbitral process depends to a large extent on the legislative set-up of the particular jurisdiction. Only in

¹⁸ In fact, Singaporean courts have made reference to the German understanding of the Model Law before, see *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others* ("*Astro v Lippo*"), [2012] SGHC 212, para 81 et seqq.

¹⁹ International Arbitration Act of 1994 (Chapter 143A, Revised Edition of 2012), available at <<http://www.siac.org.sg/our-rules/international-arbitration-act>> (accessed 14 June 2015).

²⁰ Exempt is only Chapter VIII of the Model Law, which deals with the recognition and enforcement of awards.

exercising their competencies within this framework do national courts themselves determine their involvement in the arbitral process. This framework depends on the jurisdiction's judicial system as well as on its arbitration legislation. The judicial system is particularly professional in Singapore. The Singapore government ensures the quality of arbitration related justice on different levels. For example, with Justice Judith Prakash, the Singapore High Court employs a judge exclusively dedicated to arbitral matters.²¹ In addition, the current Chief Justice of Singapore, the Honourable Sundaresh Menon, is a highly distinguished arbitration practitioner in his own right.²² And a new factor that has recently come in to play is the Singapore International Commercial Court, which is intended to complement the existing arbitration services.²³ These measures serve to uphold the high quality of arbitration related judgements in Singapore.

As regards the content of their judgements, the Singaporean courts have traditionally been regarded as particularly non-interventionist and pro-arbitration.²⁴ Indeed, when rendering decisions pertaining to international arbitration the courts repeat their “policy of minimal curial intervention” almost like a mantra.²⁵ This policy functions to fulfil two main purposes:

First, there is a need to recognise the autonomy of the arbitral process by encouraging finality, so that its advantage as an efficient alternative dispute resolution process is not undermined. Second, having opted for arbitration, parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the courts.²⁶

In *AKN v ALC* the state courts' role was further clarified. The Court of Appeal set out with the observation that its judgement fundamentally concerns the “proper relationship between arbitral tribunals and the courts”.²⁷ In unwinding this relationship the court stressed the importance

²¹ David Howell, ‘Implementing the UNCITRAL Model Law Regime in Singapore’ [2003] *German Arbitration Journal* 114, 119.

²² Allison Ross, *Menon Clarifies Courts' Role in Singapore* (9 April 2015) Global Arbitration Review <<http://globalarbitrationreview.com/news/article/33707/>> (accessed 14 June 2015).

²³ Michael Hwang, Lawrence GS Boo and Yewon Han, ‘Note General Editor Singapore (2015)’ in Jan Paulsson and Lise Bosman (eds), *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International, 1984, Supplement No. 83, March 2015) *i*.

²⁴ Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) para 1.137.

²⁵ See e.g. *BLC v BLB*, para 51, citing *Sob Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* (“*Sob Beng Tee*”), [2007] 3 SLR(R) 86, para 65 (c); also cf. *AKN v ALC*, para 37.

²⁶ *Sob Beng Tee*, para 65 (c).

²⁷ *AKN v ALC*, para 1.

of party autonomy in international arbitration, allowing the parties to choose their own arbitrators.²⁸ As the flip side to this freedom the parties must live with the consequences of their choice.²⁹ Under the “policy of minimal curial intervention” the courts must not interfere with the conclusions the arbitrators have reached on the merits and “bail out” a party who, in the course of the arbitration, has become unhappy with its choice of arbitrator.³⁰

However, this does not mean that courts will never intervene in the arbitral process. While there is no “appeal” from arbitral awards, the courts do supervise the fairness of the arbitral process and ensure that the arbitral tribunal has not made a decision that is beyond the scope of the arbitration agreement.³¹ In the words of the court, this means that

parties to an arbitration do not have the right to a ‘correct’ decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived following a fair process.³²

These two core principles, i.e. that the arbitral tribunal has to observe due process and may not exceed its jurisdiction, are the wood Trojan horse challenges are made of. The Court accordingly goes on to warn state courts of parties trying to disguise their substantive appeals to the merits of the arbitral award as jurisdictional challenges alleging a violation of these rights.³³

In conclusion, the Singaporean courts stress the basic principle of arbitration that there is no *révision au fond*. At the same time, they remain concerned with matters of due process. This opens the gates for challenges regarding a breach of natural justice and an excess of jurisdiction. These set aside grounds shall now be addressed in greater detail.

2. Set aside for “breach of the rules of natural justice” under Sec. 24 (b) IAA

In order for an award to be set aside under Sec. 24 (b) IAA there needs to be a breach of the rules of natural justice and the award must be based on this breach. The applicant has to establish *what* rule of natural justice was

²⁸ *AKN v ALC*, para 37.

²⁹ *AKN v ALC*, para 37.

³⁰ *AKN v ALC*, para 37, citing *BLC v BLB*, para 51 et seqq.

³¹ *AKN v ALC*, para 38.

³² *AKN v ALC*, para 38.

³³ *AKN v ALC*, para 39.

breached, and *how* it was breached.³⁴ The concept of natural justice is not immediately familiar to a civil lawyer. Neither does the IAA define the specific rules it entails. These rules derive from the English common law tradition and form an integral part of Singapore's common law heritage.³⁵ In the common law tradition, the concept of natural justice comprises the two Latin adages of *audi alteram partem* and *nemo iudex in causa sua*.³⁶ The former requires that a party affected by a decision must be given proper notice, be informed of the matters to be decided and be given sufficient opportunity to present its case.³⁷ The latter requires that the decision-maker be financially and mentally impartial in his decision.³⁸

Arguably, these basic procedural rights are already included by Singapore's reference to the Model Law in Sec. 3 (1) IAA. Indeed, Art. 34 (2) (a) (ii) ML can be considered a direct codification of the *audi alteram partem* principle,³⁹ meaning that in this regard the Model Law's scope of protection does not differ from Sec. 24 (b) IAA.⁴⁰ Furthermore, while the violation of *nemo iudex in causa sua* is not expressly codified as a ground for set aside in the Model Law, an award rendered by a biased arbitrator could still be challenged.⁴¹ Either under Art. 34 (2) (a) (ii) ML because a partial arbitrator will in most cases deny a party the opportunity to properly present its case,⁴² or in any case under Art. 34 (2) (b) (ii) ML since an award rendered by a partial tribunal violates public policy.⁴³ Hence, strictly

³⁴ *Song Beng Tee*, para 29 citing *John Holland Pty Ltd v Toyo Engineering Corp (Japan)*, [2001] 1 SLR(R) 443, para 18.

³⁵ Judith Prakash, 'Challenging Arbitration Awards for Breach of the Rules of Natural Justice' (at the CI Arb International Arbitration Conference 2013, Penang, Malaysia, 24 August 2013) para 1 <<https://www.supremecourt.gov.sg/data/doc/ManagePage/4962/Judith%20Prakash%20J%20speech%20delivered%20at%20%20CIArb%20International%20Arbitration%20Conference%202013.pdf>> (accessed 6 June 2015).

³⁶ Harry Woolf, Jeffrey Jowell and Andrew Le Sueur, *De Smith's Judicial Review* (Sweet & Maxwell, 6th ed, 2007) 322.

³⁷ GDS Taylor, 'Fairness and Natural Justice - Distinct Concept or Mere Semantics?' (1977) 3 *Monash University Law Review* 191, 202.

³⁸ *Ibid.*

³⁹ Cf. Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers, T.M.C. Asser Instituut, 1989) 971 et seq.

⁴⁰ *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc*, [2006] SGHC 206, para 18.

⁴¹ See also Gabriël Moens and Peter Gillies, *International Trade and Business: Law, Policy and Ethics* (Cavendish Publishing, 1st ed, 1998) 744.

⁴² Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd ed, 2014) 3277.

⁴³ Moens and Gillies, above n 41, p. 744; cf. Sec. 12 IAA requiring the independence and impartiality of arbitrators.

speaking, the set aside ground of Sec. 24 (b) IAA would not have been necessary in order to protect the basic procedural rights covered by the rules of natural justice. Indeed, the provision was not included in Singapore's arbitration legislation to provide protection beyond the scope of Art. 34 ML but to emphasize the significance of natural justice to Singapore's common law tradition.⁴⁴ Accordingly, in practice the relevant provisions of the IAA and the ML are usually cited together and used interchangeably.⁴⁵

In terms of *how* the particular rule was breached, Trojan horse challenges usually invoke a violation of the right to present one's case.⁴⁶ The assertion is that a certain argument or piece of evidence submitted by one party was not (properly) addressed in the award and that the arbitrators have thus violated the party's right to present its case.⁴⁷ When faced with this kind of argument, the Singaporean courts start out by stressing that the Model Law does not entitle them to "undertake a review of the substantive merits of the underlying dispute".⁴⁸ Matters of fact and law the arbitral tribunal has dealt with are excluded from judicial review and it is "important for the Court to resist its natural tendency [...] to plunge into the details of the arbitration and second-guess the arbitration not only on the result but also on the punctilio of the process".⁴⁹ Thus, when ascertaining a violation of the right to present one's case, the only relevant circumstance should be *if* the arbitral tribunal has in fact sufficiently dealt with the argument at issue. *How* it has dealt with the argument, i.e. whether it has applied the law incorrectly or has misconceived the facts, should not be part of curial intervention under Sec. 24 (b) IAA. In order to make the courts aware of cases where this differentiation is difficult, the court in *AKN v ALC* has enumerated commonly used arguments to achieve a revision of the merits of the award. Among these assertions are

- (a) that the arbitral tribunal misunderstood the case presented and so did not apply its mind to the actual case of the aggrieved party;

⁴⁴ Prakash, above n 35, para. 1.

⁴⁵ See *AKN v ALC*, para 22: "s 24(b) [IAA] read with Art 34(2)(a)(ii) [ML] (emphasis added)"; also cf. *AKM v AKN*, para 9; cf. *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc*, para 18.

⁴⁶ See e.g. *AQU v AOV*, [2015] SGHC 26, para 14 et seqq.; *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* ("Front Row"), [2010] SGHC 80, para 18; *Sob Beng Tee* at para 26.

⁴⁷ *Ibid.*; also cf. Kushboo Hashu Shahdarpuri, 'The Natural Justice Fallibility in Singapore Arbitration Proceedings' (2014) 26 *Singapore Academy of Law Journal* 562, 566.

⁴⁸ *AQU v AOV*, para 32; also see *BLC v BLB*, para 51 et seqq.; *TMM Division*, para 110; *Front Row*, para 52; *Sob Beng Tee* para 65 (b).

⁴⁹ *Sob Beng Tee*, para 62, citing *Mungo v Saverino*, [1995] OJ No 3021.

- (b) that the arbitral tribunal did not mention the arguments raised by the aggrieved party and so must have failed to consider the latter's actual case; and
- (c) that the arbitral tribunal must have overlooked a part of the aggrieved party's case because it did not engage with the merits of that part of the latter's case.⁵⁰

While these arguments might appear as valid grounds to set aside an award based on a breach of natural justice, they usually do not hold water.⁵¹ The decisive factor is whether the arbitral tribunal has sufficiently considered all pleaded issues.⁵² This determination is of course not an easy one. A third party, like a state court, can never fully retrace the process of arbitral decision-making. This makes it very hard to prove whether one particular piece of evidence or submission influenced the final decision of the arbitral tribunal.⁵³ Because of these difficulties the Court of Appeal clarified that the determination of whether a certain argument was ignored can usually only be made by inference.⁵⁴ This inference may not be drawn unless "it is clear and virtually inescapable" that the arbitrator has ignored an issue.⁵⁵ When conducting this test, the courts take into account all documents available to them, including the award, minutes of oral hearings and written submissions by the parties.⁵⁶ The Court of Appeal emphasized that the facts gleaned from the courts' review can also be consistent with the arbitrator simply having misunderstood the issue, being mistaken about the law or facts, or having chosen not to further follow the particular argument. In such cases the inference may not be drawn.⁵⁷

In conclusion, the Singaporean courts stress that they may not review the merits of the award when determining a breach of the rules of natural justice. At the same time, they do take into account the substantive submissions of the parties and all parts of the award. While this necessary in order to ascertain whether the arbitrators have applied their mind to a certain issue, this review also increases the possibility of revisiting the substantive portions of the award.

⁵⁰ *AKN v ALC*, para 39.

⁵¹ *AKN v ALC*, para 39.

⁵² *AKN v ALC*, para 46.

⁵³ Cf. Pierre A Karrer, *Introduction to International Arbitration Practice: 1001 Questions and Answers* (Wolters Kluwer, 2014) para 759.

⁵⁴ *AKN v ALC*, para 46.

⁵⁵ *AKN v ALC*, para 46.

⁵⁶ See e.g. *BLC v BLB*, para 47.

⁵⁷ *AKN v ALC*, para 46.

3. Set aside for excess of jurisdiction under Art. 34 (2) (a) (iii) ML (Singapore’s *de novo* approach)

Under Art. 34 (2) (a) (iii) ML an award may be set aside if it deals with issues not within the scope of the parties’ arbitration agreement or the issues presented to the arbitral tribunal. Accordingly, this ground has been dubbed “excess of jurisdiction”.⁵⁸ It provides for the possibility of a (partial) set-aside regarding those portions of the award exceeding the tribunal’s authority.

In determining whether the arbitral tribunal has in fact acted outside the scope of submission the Singaporean courts employ a particular standard of review. The Court of Appeal notes that

although the courts should not, in general, engage in the merits of the dispute when dealing with applications to set aside arbitral awards, an exception arises when the courts are confronted with arguments relating to the jurisdiction of the arbitral tribunal.⁵⁹

In these cases the Singaporean courts undertake a “*de novo* hearing” regarding the arbitral tribunal’s jurisdiction.⁶⁰ In this *de novo* hearing, the tribunal’s determination regarding its jurisdiction has no legal or evidential value.⁶¹ The court itself determines the scope of the arbitration agreement and of the parties’ submissions, i.e. the relief they have requested.⁶² Only if the court’s determination differs from the relief provided for in the award may it set aside the relevant portions of the award.

Insofar, the Court of Appeal’s reference to “the merits of the dispute” requires some clarification. The Model Law’s language differentiates between procedural and substantive matters.⁶³ For the present purposes, question of procedure can be defined as referring to the conduct of the arbitral proceedings, whereas substantive issues refer to the tribunal’s material findings in the award. While some civil law jurisdictions strictly

⁵⁸ See e.g. David AR Williams, ‘Defining the Role of the Court in Modern International Commercial Arbitration’ (2014) 10 *Asian International Arbitration Journal* 137, 156.

⁵⁹ *AKN v ALC*, para 112.

⁶⁰ *AKN v ALC*, para 112, citing *AQZ v ARA*, [2015] SGHC 49, para 49; *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal (“Lippo v Astro”)*, [2013] SGCA 57, para 163.

⁶¹ *Lippo v Astro*, para 162 et seq., citing *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*, [2011] 1 AC 763, para 30.

⁶² See *AQZ v ARA*, para 52, arguing that a complete re-hearing is usually not necessary as the courts can revert to the material produced in the arbitration, e.g. transcripts of hearings, submissions by the parties.

⁶³ Marianne Roth, ‘UNCITRAL Model Law on International Commercial Arbitration’ in Frank-Bernd Weigand (ed), *Practitioner’s Handbook on International Commercial Arbitration* (Oxford University Press, 2nd ed, 2009) para 14.473.

discern between these two aspects,⁶⁴ the distinction is not always as clear in common law jurisdictions.⁶⁵ What the Singaporean courts mean to do in their “*de novo* hearing” is not to review the merits of the substantive findings of the award in respect to law or facts. What they mean to do is to review whether the procedural determinations the arbitral tribunal has made have merit. They ascertain this “procedural correctness” of the tribunal’s decision by re-determining the formation and scope of the parties’ arbitration agreement, and what relief they have requested (i.e. what issues the parties have submitted to the arbitral tribunal).

A prime example for an award beyond the scope of submission would be a case where the arbitral tribunal renders an award that neither party has requested (*ultra petita*).⁶⁶ In determining what has been requested by the parties the courts will look at the entire course of the arbitration, including but not limited to the notice of arbitration, the terms of reference and the parties’ pleadings.⁶⁷ While the courts often emphasize that they will not be “sifting through the entire record [...] with a fine tooth comb”,⁶⁸ their decisions in this regard are rather detailed.⁶⁹ In particular, the Singaporean courts are not afraid to re-interpret the parties’ claims and set aside the award if they arrive at a more narrow interpretation of the claim than the arbitral tribunal.⁷⁰

Another possible case of an excess of jurisdiction is where the arbitral tribunal extends the legal effect of an award to parties that are not signatories to the arbitration agreement. Prior Singaporean case law has not subsumed such situations under Art. 34 (2) (a) (iii) ML since for an *excess* of jurisdiction to exist the tribunal must have jurisdiction over the additional party in the first place.⁷¹ Since this was usually not the case with a non-signatory, the Singaporean courts had until now referred to

⁶⁴ See Peter Schlosser, ‘Anhang § 1061 ZPO’ in Stein and Jonas (eds), *Kommentar zur Zivilprozessordnung* (Mohr Siebeck, 22nd ed, 2002) para 116.

⁶⁵ Summary Records of the UNCITRAL meetings devoted to the preparation of the Model Law, 327th meeting, para 41 <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_travaux.html> (accessed 14 June 2015).

⁶⁶ *AKN v ALC*, para 72, citing *PT Prima International Development v Kempinski Hotels SA and other appeals* (“*Kempinski?*”), [2012] 4 SLR 98, para 34.

⁶⁷ See e.g. *TMM*, para 52; *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* (“*CRW?*”), [2011] SGCA 33, para 43.

⁶⁸ *TMM*, para 42; also cf. *BLC v BLB*, para 86: “the court [should not] approach an award with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards”.

⁶⁹ Lee, above n 8 notes the extraordinary length of pertinent judgements.

⁷⁰ See e.g. *AKM v AKN*, para 183 et seqq.

⁷¹ *Aloe Vera of America, Inc v Asianic Food (S) Pte. Ltd. and another* (“*Aloe Vera?*”), [2006] 3 SLR 174, para 66 et seqq; also cf. *CRW?*, para 31.

Art. 34 (2) (a) (i) ML.⁷² In *AKN v ALC*, however, the facts lie somewhat differently and an excess of jurisdiction was invoked by a party that was not privy to the arbitration agreement.⁷³

To sum up, when determining an excess of jurisdiction the Singaporean courts conduct a *de novo* hearing, in which they comprehensively review the parties' substantive claims and arguments. If they interpret the parties' submission to arbitration more narrowly than the arbitral tribunal they will set aside the pertinent portions of the award.

The article will now address the decision in *AKN v ALC* in order to ascertain how the court in that case approached the possible Trojan horse challenges. It will report on the facts of the case and the Court of Appeal's reasoning.

III. Singapore Court of Appeal's Decision in *AKN v ALC*

1. Facts of the case

In *AKN v ALC*, the Singapore Court of Appeal was faced with a decision by the Singapore High Court to set aside an arbitral award made under the auspices of the Singapore International Arbitration Centre (SIAC).⁷⁴ While, for reasons of confidentiality,⁷⁵ the High Court had redacted its judgement by references to JRR Tolkien's *The Lord of the Rings*,⁷⁶ the parties and dispute matter were later identified:⁷⁷

The underlying dispute arose after two Indian corporations (the Purchasers) had bought a Philippine steel production plant in the course of the liquidation of its operator National Steel Corp. (NSC). The purchase was governed by two agreements. First, an Asset Purchase Agreement (APA) between NSC's Liquidator, some of its Secured Creditors and the Purchasers. It provided for the Secured Creditor's obligation to transfer title of all plant assets "free from and clear of all Liens of any kind" to the Purchasers. In turn, the Purchasers agreed to payment by two notes to the

⁷² Cf. *Aloe Vera*, para 67 for the relevant provision in Singapore's national arbitration legislation.

⁷³ See below at III. 1. p. 11.

⁷⁴ *AKM v AKN and another and other matters* ("*AKM v AKN*"), [2014] SGHC 148.

⁷⁵ Under Sec. 22 IAA a party may apply to seal the proceedings and keep them confidential. This application was granted in the original case before the High Court (*AKM v AKN*, para 2) and upheld by the Court of Appeal (*AKN v ALC*, para 2).

⁷⁶ *AKM v AKN*, para 2.

⁷⁷ Sebastian Perry, *Philippine Steel Award Set Aside in Singapore* (9 September 2014) Global Arbitration Review <<http://globalarbitrationreview.com/news/article/32941/philippine-steel-award-set-aside-singapore/>> (accessed 14 June 2015). In the judgement, the plant at heart of this dispute produced *Mithril* rather than steel and it was situated in *Erebor* in the country of *Moria* rather than the City of Iligan in the Philippines.

benefit of the Secured Creditors (the Notes). Second, an omnibus agreement, in which the terms of these Notes were set out in detail (OMNA). This second agreement provided for payment in several instalments to the holders of the Notes, some of which were later sold on to a number of investment funds (the Funds). Significantly, these two agreements provided for conflicting methods of dispute resolution. While the APA provided for SIAC arbitration, the OMNA contained a choice of court agreement.

One key prerequisite in the APA for the completion of the transaction was a Tax Amnesty Agreement (TAA) to be granted by the Iligan City municipal authorities. While the Liquidator had initially procured this document it was later revoked due to NSC's unpaid taxes. Upon this revocation the Purchasers stopped satisfying the Notes and commenced SIAC proceedings under the APA.

In the SIAC arbitration, the Purchasers applied for a declaration that the taxes owed by NSC were a type of lien breaching the APA and that they were therefore entitled to stop payment under the Notes. The tribunal complied with this application and additionally awarded damages for "a lost opportunity to earn profits".⁷⁸ This award of damages did not only hold the Secured Creditors liable but also the Funds, who had purchased the Notes on the secondary market and had merely joined the arbitration as interested parties.

In the proceedings before the High Court, the Liquidator, the Secured Creditors, and the Funds applied to set aside the award. They argued that (i) the arbitral tribunal had breached the rules of natural justice by ignoring their arguments that the APA was qualified to the extent of the TAA; that the tribunal had exceeded its jurisdiction by (ii) re-characterizing the Purchasers' claim for loss of profit to one for loss of an opportunity to earn profits and (iii) by suspending the Purchasers' payment obligation under the Notes; in addition, the Funds argued that (iv) the Tribunal also exceeded its jurisdiction in holding them liable although they had never become a party to the APA.⁷⁹ As requested, the High Court set aside the award in its entirety for a breach of the rules of natural justice under Sec. 24 (b) IAA (i) and for excess of jurisdiction under Art. 34 (2) (a) (iii) ML (ii)-(iii).⁸⁰ However, despite being a moot point after already setting aside the award under (i)-(iii), it declared that it did not confirm the Funds' challenge under (iv) as it considered them fully liable under the APA.⁸¹

⁷⁸ *AKM v AKN*, para 8.

⁷⁹ *AKM v AKN*, para 14.

⁸⁰ *AKM v AKN*, para 200.

⁸¹ *AKM v AKN*, para 296.

The Purchasers and Funds then turned to the Singapore Court of Appeal arguing that the High Court had conducted an impermissible review on the merits and that therefore its set aside decision should be overturned. The Court of Appeal followed this argument to a certain extent, thus partially reinstating the arbitral award. Its decision shall be analysed in the following.

2. Decision of the Court of Appeal

a) Set aside for breach of the rules of natural justice in *AKN v ALC*

Turning to the appellants' first issue (*i*), the Court of Appeal set out by reporting on the High Court's decision.⁸² The High Court had found that the tribunal mistook pleadings by the Liquidator pertaining to the qualification of the APA as a different argument and entirely ignored the argument the Liquidator was trying to make.⁸³ In the eyes of the High Court this led to the award not only being wrong but also "contradict[ing] the tribunal's own factual narrative".⁸⁴ It therefore set the award aside for breach of natural justice.⁸⁵ The Court of Appeal found that the High Court had erred in its conclusion since "poor reasoning on part of an arbitral tribunal is not a ground to set aside an arbitral award".⁸⁶ A badly reasoned or contradictory award does not justify the "clear and virtually inescapable" inference that the arbitrators have ignored an argument. In fact, if the courts were to meticulously scrutinize the reasoning of an award in order to determine whether the tribunal might have ignored one particular argument, this would effectively amount to an impermissible review on the merits of the case.⁸⁷ The court went on to state that even if there had been a breach of natural justice the High Court was wrong in setting aside the entire award and should only have vacated those parts pertaining to the breach.⁸⁸

This analysis and line of argument appear as a return to the core principle that there will be no review of the substantive portions of the award. When the High Court had scrutinized the reasoning of the arbitral tribunal as to its correctness it had departed from the path of minimal curial intervention. The Court of Appeal has warned the Singaporean courts not to fall for

⁸² *AKN v ALC*, para 55.

⁸³ *AKN v ALC*, para 56.

⁸⁴ *AKM v AKN*, para 102, emphasis omitted.

⁸⁵ *AKM v AKN*, para 123.

⁸⁶ *AKN v ALC*, para 59; also cf. para 98: "We are not concerned with whether the Tribunal's ruling [...] was correct or not".

⁸⁷ *AKN v ALC*, para 59, citing *BLC v BLB*, para 86.

⁸⁸ *AKN v ALC*, para 61.

parties' substantive arguments and to only determine whether a clear inference can be drawn that the tribunal has entirely ignored certain submissions. In this regard, Trojan horse challenges appear to be less likely to succeed in the future.

b) Set aside for excess of jurisdiction in *AKN v ALC*

In terms of an excess of jurisdiction under Art. 34 (2) (a) (iii) ML there were three issues before the Court of Appeal (ii)-(iv). Regarding the first issue, what the Purchasers had requested in their notice of arbitration was an award of “damages”. Throughout the arbitration the parties proceeded on the basis that this generic claim for “damages” regarded damages for loss of profit.⁸⁹ However, at the last day of hearings there was an exchange between counsel for the Purchasers and the presiding arbitrator concerning damages for “loss of opportunity to earn profits”, after which the tribunal had awarded these damages. The High Court had interpreted the Purchaser’s claim anew and conducted a thorough analysis of whether “loss of an opportunity to earn profits” was different from “loss of profit”.⁹⁰ It came to the conclusion that, in fact, a generic claim for “damages” was not broad enough to comprise a loss of opportunity to earn profits.⁹¹ The court concluded that the tribunal had thus awarded damages that were never asked for and thereby acted *ultra petita*, i.e. in excess of jurisdiction.⁹²

The Court of Appeal did not agree with this reasoning. It argued that, had the Purchasers made a formal application to amend their claim, the Tribunal would have had the “discretionary jurisdiction” to award these damages.⁹³ Hence, it distanced itself from the High Court’s formal approach to only take into account the initial notice of arbitration and also regarded the Purchasers’ oral submissions. However, despite this error by the High Court, the Court of Appeal still did not reinstate the award in its relevant parts. It held that, since this oral submission took place at the last day of hearings, the Respondents in the arbitration did not have any opportunity to respond to the new aspect of the damages claim “at the eleventh hour”.⁹⁴ This lack of an opportunity to present their case on this point constituted a breach of natural justice.⁹⁵ Accordingly, the Court of Appeal confirmed the set aside under Sec. 24 (b) IAA instead of Art. 34 (2) (a) (ii) ML.

⁸⁹ *AKN v ALC*, para 69.

⁹⁰ *AKM v AKN*, para 183 et seqq.

⁹¹ *AKM v AKN*, para 163.

⁹² *AKM v AKN*, para 200.

⁹³ *AKN v ALC*, para 74.

⁹⁴ *AKN v ALC*, para 78 et seq.

⁹⁵ *AKN v ALC*, para 80.

Regarding the second issue, the High Court had found that the Tribunal exceeded its jurisdiction when it granted the Purchasers relief in respect to their payment obligations under the Notes.⁹⁶ This issue concerned the scope of the arbitration agreement in the APA. The Respondents' argument was that the payment obligation arose under the Notes and that it was therefore subject to dispute settlement mechanism of the OMNA (i.e. state court litigation).⁹⁷ The High Court had confirmed that the obligations under the Notes only pertained to the OMNA and were therefore beyond the scope of the arbitration agreement in the APA.⁹⁸

In dealing with this issue the Court of Appeal construed the scope of the arbitration agreement of the APA. It agreed that the APA explicitly referred disputes regarding the payment obligation under the Notes to the OMNA and that therefore such a dispute was outside the scope of the APA's arbitration agreement.⁹⁹ This result was also commercially feasible since the Notes were meant to be sold on to third parties not in connection with the APA, such as the Funds.¹⁰⁰ Thus, the Tribunal had exceeded the scope of the arbitration agreement of the APA when declaring that the Purchasers were entitled to stop payment under the Notes.¹⁰¹ The Court of Appeal therefore confirmed the set aside of the relevant portions of the award.

Finally, the third issue regarded the Funds' liability for the Secured Creditors' breach of the APA. After having purchased the right to payment under the Notes on the secondary market, the Funds had joined the arbitration as "interested parties".¹⁰² While their exact status remained uncertain throughout the arbitration, it was clear that they neither had been involved when the APA was signed nor when the Purchasers commenced the arbitration.¹⁰³ Nevertheless, in the award they were held liable just like the Secured Creditors.

While the High Court expressed its "sympathy" for the Funds' position and found their liability "odd", it considered itself incompetent to interfere with the Tribunal's findings.¹⁰⁴ In this regard, it did hold that it was not entitled to revisit the merits of the award.¹⁰⁵ The Court of Appeal disagreed

⁹⁶ *AKM v AKN*, para 251 et seqq.

⁹⁷ *AKN v ALC*, para 108.

⁹⁸ *AKM v AKN*, para 265.

⁹⁹ *AKN v ALC*, para 116.

¹⁰⁰ *AKM v AKN*, para 259 et seqq.

¹⁰¹ *AKN v ALC*, para 116.

¹⁰² *AKN v ALC*, para 124.

¹⁰³ *AKN v ALC*, para 118.

¹⁰⁴ *AKM v AKN*, para 276.

¹⁰⁵ *AKM v AKN*, para 276.

and investigated the grounds for the Funds' liability. It approached the issue in regard to the scope of the Tribunal's jurisdiction over the Funds.¹⁰⁶ It noted that no claims were brought against the Funds in the notice of arbitration, and that such a claim was never added when the Funds had joined the arbitration.¹⁰⁷ Rather, the Funds merely accepted to be bound by the Tribunal's decision as far as the *res judicata*-effect of its decision on the existence of the Purchaser's payment obligation went.¹⁰⁸ It further stated that there was no "sound legal basis" for the Funds' liability under the APA and that the burden of proof for such a basis was upon the Purchasers.¹⁰⁹ From these observations it deduced that the Funds had only vested a "limited jurisdiction" in the tribunal, insofar that they were bound by its findings of fact and law, but not concerning any alleged obligations under the APA.¹¹⁰ Hence, the Court of Appeal affirmed an excess of jurisdiction and set aside the portion of the award holding the Funds liable.¹¹¹

To sum up, the three issues demonstrate the boundaries for set aside for an excess of jurisdiction in Singapore. The Court of Appeal clarified that in the course of the *de novo* review not only the notice of arbitration but also the parties' statements in the oral hearings can be re-interpreted. The same is true for the scope of the arbitration agreement and the dispute matter it comprises. When determining whether the tribunal had jurisdiction over a joined party, the Court of Appeal not only interpreted the tribunal's jurisdiction over that party anew but also considered grounds for liability and the burden of proof.

In the following, these issues shall be analysed from a German perspective. In order to do that, the article will first address the general set up of German arbitration legislation and then evaluate the Singapore Court of Appeals reasoning in *AKN v ALC* regarding Trojan horse challenges.

IV. Evaluation from a German Perspective

Germany has adopted the Model Law in a 1998 revision of its arbitration law.¹¹² The major reason for this adoption was to further Germany's attractiveness as an arbitral seat.¹¹³ The relevant provisions are located in

¹⁰⁶ *AKN v ALC*, para 130 et seqq.

¹⁰⁷ *AKN v ALC*, para 132.

¹⁰⁸ *AKN v ALC*, para 135.

¹⁰⁹ *AKN v ALC*, para 135 et seq.

¹¹⁰ *AKN v ALC*, para 137.

¹¹¹ *AKN v ALC*, para 138 et seq.

¹¹² BGBl. 1997 I, 3224; English version available at <<http://www.trans-lex.org/600550/>> (accessed 14 June 2015).

¹¹³ Official Report on the Bill of the Arbitration Law Reform Act, 12 July 1996, BT-Drs. 13/5274, 1.

the 10th book of the German Code of Civil Procedure (*Zivilprozessordnung*, ZPO), comprising Sec. 1025-1066 ZPO. Contrary to the IAA and the Model Law, they apply to both domestic and international arbitrations.¹¹⁴

1. German approach to the relationship between arbitral tribunals and the courts

Just like in Singapore, German arbitration legislation and its courts adopt a favourable attitude towards arbitration.¹¹⁵ The German Federal Court of Justice (*Bundesgerichtshof*, BGH) has on several occasions confirmed its “arbitration friendly attitude”.¹¹⁶

Similar to the Singaporean court system, Germany also endeavours for a fast and efficient supervision of the arbitral process. Therefore, the competency to decide set aside applications has been assigned to the Higher Regional Courts (*Oberlandesgerichte*, OLGs),¹¹⁷ most of which have installed a special chamber to deal with arbitral matters.¹¹⁸ This is meant to ensure that mainly judges familiar with arbitration will decide set aside applications and that a coherent jurisprudence develops.¹¹⁹ Still, naturally the countries’ different sizes means that arbitration related judgements are less centralized in Germany. While in Singapore the High Court and Court of Appeal decide all arbitral matters, in Germany jurisdiction is divided between twenty-four different OLGs and the BGH.

In regard to set aside proceedings, Germany has adopted Art. 34 ML almost verbatim in Sec. 1059 ZPO. Contrary to Singapore it has not added any further grounds on which to set aside an arbitral award. The principle that the courts will not review the substantive issues of the case is inherent with Sec. 1059 ZPO and confirmed by case law.¹²⁰

¹¹⁴ According to Sec. 1025 (1) ZPO the 10th book applies as long as the seat of the arbitration is in Germany.

¹¹⁵ Karl-Heinz Böckstiegel, Stefan Kröll and Patricia Nacimiento, ‘General Overview’ in Karl-Heinz Böckstiegel, Stefan Kröll and Patricia Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (Kluwer Law International, 2nd ed, 2015) 3, 15.

¹¹⁶ See e.g. Decision of 30 September 2010, BGHZ 187, 126, 130; Decision of 21 September 2005, (2005) *Neue Juristische Wochenschrift* 3499, 3500 (translation by the author).

¹¹⁷ Sec. 1062 (1) No. 4 ZPO.

¹¹⁸ For a detailed list of these special senates see ‘Spezialzuständigkeit für Schiedsverfahren jetzt auch in Frankfurt und Düsseldorf’ [2005] *German Arbitration Journal* 90, 91.

¹¹⁹ *Ibid* 90.

¹²⁰ See the official government statement regarding Sec. 1059 ZPO, BT-Drs. 13/5274, 58 et seq; as well as OLG Köln, Decision of 23 April 2004, [2005] *German Arbitration Journal* 163, 165 with further references.

2. “Breach of the rules of natural justice” in Germany

While there is no immediate equivalent to Sec. 24 (b) IAA in the ZPO, as pointed out above, Art. 34 (2) (a) (ii) ML emanates the rights comprised by natural justice.¹²¹ Hence, the rules of natural justice are protected under Sec. 1059 (2) No. 1 (b) ZPO.¹²² The right to be heard is also protected by the German Constitution. Much like the significance Singapore attributes to the rules of natural justice,¹²³ does the right to be heard amount to a constitutional right in Germany.¹²⁴ What is interesting for the purposes of this article is whether the German interpretation of Art. 34 (2) (a) (ii) ML differs from the Singapore approach.

As for similarities, under the German understanding the right to be heard also requires, amongst others, that the arbitral tribunal take the parties’ arguments into account when making its decision.¹²⁵ This means that the tribunal must consider all evidence and submissions that have been put before it.¹²⁶ It does, however, not mean that the German courts will review the tribunal’s weighing and evaluation of evidence.¹²⁷ The tribunal also remains free to disregard arguments it considers irrelevant for rendering its decision.¹²⁸ Of course, the practical difficulties in proving whether the arbitral tribunal has sufficiently dealt with a certain argument in its deliberations remain the same as in Singapore.¹²⁹ German courts will therefore only test whether an argument of considerable importance was not addressed at all in the award, or whether it was only mentioned in passing.¹³⁰ If this is the case and the argument was relevant for the outcome of the award, just like in Singapore, there is the inference that the tribunal has not sufficiently dealt with the party’s arguments and that therefore its right to be heard was violated.¹³¹

¹²¹ See above, II. 2. p. 4.

¹²² Sec. 1059 (2) No. 1 (b) ZPO is a verbal adoption of Art. 34 (2) (a) (ii) ML.

¹²³ See above, II. 2. p. 6.

¹²⁴ Art. 103 (1) read with Art. 93 (1) No. 4 (a) of the German Constitution.

¹²⁵ OLG München, Decision of 14 March 2011, [2011] *German Arbitration Journal* 159, 165; OLG Köln, Decision of 3 June 2003, 9 Sch 23/02, available at <<http://www.dis-arb.de/en/47/datenbanken/rspr/olg-koeln-case-no-9-sch-23-02-date-2003-06-03-id282>> (accessed 14 June 2015).

¹²⁶ BGH, Decision of 14 May 1992, [1992] *Neue Juristische Wochenschrift* 2299, 2299; OLG Köln, above n 121, 165.

¹²⁷ OLG München, Decision of 14 November 2011, [2012] *German Arbitration Journal* 43, 46.

¹²⁸ OLG München, above n 125, 165.

¹²⁹ See above, II. 2. p. 7; cf. Jens-Peter Lachmann, *Handbuch für die Schiedsgerichtspraxis* (Otto Schmidt, 3rd ed, 2008) para 1354.

¹³⁰ BGH, above n 126, 2299 et seq.; OLG München, Decision of 20 April 2009, OLGR München 2009, 482, 483; see also Schlosser, above n 64, para 95.

¹³¹ BGH, Decision of 26 September 1985, BGHZ 96, 40, 48 et seq.; see also Lachmann, above n 129, para 1354.

For the first issue in *AKN v ALC* this means that German courts would have arrived at the same conclusion as the Singapore Court of Appeal. Although the arbitrators may have misunderstood the argument counsel was trying to make, they still have dealt with the argument and have included reference to it in their award.¹³² The inference that the tribunal has ignored the argument can therefore not be drawn. As pointed out by the Singapore Court of Appeal, the parties carry the burden of risk regarding a point of law or fact the tribunal does not fully comprehend.¹³³ The principle that there is no *révision au fond* prevents the state courts from remedying such a situation.

Nevertheless, the conundrum between ensuring the right to be heard on one, and not engaging with the merits of the case on the other side also exists in Germany.¹³⁴ It is noteworthy that German courts, while stressing the impermissibility of a *révision au fond*,¹³⁵ sometimes also conduct a rather detailed review of the tribunal's reasoning.¹³⁶ As noted above, this practice can also be observed with the Singaporean courts.¹³⁷ It might function to base the courts' decision on a broader base, i.e. to serve as a "fallback argument".¹³⁸ Indeed, the prerequisite that the award must be *based* on the violation of the right to be heard leads many courts to the statement that the award's material findings do not change on the alleged violation and that therefore there can "in any case" be no violation of the right to be heard.¹³⁹ Strictly speaking, however, this line of argument pertains to substantive issues, which are not under review in set aside proceedings. This practice might be explained by the extraordinary status of the right to be heard in both jurisdictions.

3. "Excess of jurisdiction" in Germany

Sec. 1059 (2) No. 1 (c) ZPO is a literal translation of Art. 34 (2) (a) (iii) ML, meaning that also in this regard the two Model Law jurisdictions have adopted the same legal framework. But despite this identical framework, the courts' interpretation of the provision differs.

¹³² See *AKN v ALC*, para 57, citing the relevant passage of the award.

¹³³ See above II. 1. p. 5.

¹³⁴ Stefan Kröll, 'Die Entwicklung des Schiedsrechts 2009–2010' [2011] *Neue Juristische Wochenschrift* 1265, 1268.

¹³⁵ OLG Stuttgart, Decision of 30 July 2010, [2011] *German Arbitration Journal* 49, 52.

¹³⁶ Kröll, 'Die Entwicklung Des Schiedsrechts 2009–2010', above n 134, 1268. See e.g. OLG Stuttgart, above n 135, 50 et seqq.; OLG Celle, Decision of 20 November 2003, [2005] *Yearbook Commercial Arbitration Vol. XXX* 547, 550 et seqq.

¹³⁷ See above, II. 2. p. 7.

¹³⁸ Stefan Kröll and Peter Kraft, 'Commentary on § 1059 ZPO' in Karl-Heinz Böckstiegel, Stefan Kröll and Patricia Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (Kluwer Law International, 2nd ed, 2015) 383, 406 fn 136.

¹³⁹ See e.g. BGH, Decision of 26 September 1985, BGHZ 96, 40, 48.

In *AKN v ALC*, the first issue regarding an excess of jurisdiction was that the arbitral tribunal acted *ultra petita*, i.e. that it awarded more than the Purchasers had requested. While German courts also consider it an excess of jurisdiction in terms of Sec. 1059 (2) No. 1 (c) ZPO if a tribunal acts *ultra petita*,¹⁴⁰ they will not review the tribunal's interpretation of the parties' claims.¹⁴¹ This is because, in the German understanding, such a re-interpretation would amount to a scrutiny of the tribunal's reasoning, violating the prohibition of a *révision au fond*.¹⁴² What they will consider is a violation of the terms of reference, i.e. a party agreement on the outset of the arbitral proceedings detailing the claims to be dealt with.¹⁴³ However, neither of the Singaporean courts addressed the terms of reference in this regard.¹⁴⁴ Rather, they referred to the Purchasers' notice of arbitration (a unilateral statement),¹⁴⁵ and interpreted the Purchasers generic claim for "damages" anew. In the eyes of the German courts, such re-interpretation amounts to a review of the tribunal's reasoning in regards to the substantive issues of the case.

The main difference to the Singapore approach therefore appears to be that, in this regard, the German courts do not conduct a "*de novo*" evaluation like the Singaporean courts do. Where the Singaporean courts re-evaluate the scope of a party's claim for "damages" German courts would refuse to do so with a reference to the prohibition of a *révision au fond*. This judicial self-restraint means that the boundaries of a set aside application are narrower in Germany. German courts thereby avoid the conundrum Singaporean courts find themselves faced with when trying to discern meritorious from unmeritorious challenges. However, they also run at risk of not scrutinising the arbitral process enough and denying a challenge under Sec. 1059 (2) No. 1 (c) ZPO. In the case at hand, these considerations are of purely academic interest. Here, the issue turned on the defendant's lack of an opportunity to respond to the new arguments discussed "at the eleventh hour". Such lack of opportunity to present

¹⁴⁰ Cf. Kröll and Kraft, above n 138, 407; for the opposing view in literature Lachmann, above n 129, para 2248.

¹⁴¹ OLG München, Decision of 5 October 2009, BeckRS 2011, 08217; see also Kröll and Kraft, above n 138, 407.

¹⁴² OLG München, above n 144; also cf. OLG Frankfurt a.M., Decision of 29 October 2009, [2010] *German Arbitration Journal* 52, 55; OLG München, above n 125, 165 et seq.

¹⁴³ Schlosser, above n 64, para 115; however, according to Stefan Münch, 'Commentary on § 1059 ZPO' in Thomas Rauscher and Wolfgang Krüger (eds), *Münchener Kommentar zur ZPO* (C.H. Beck, 4th ed, 2013) para 19 such a violation would rather be subsumed under Sec. 1059 (2) No. 1 (d) 2nd alternative ZPO.

¹⁴⁴ In fact, from the judgements in *AKM v AKN* and *AKN v ALC* it does not become apparent that the parties had even concluded such an agreement at the outset of the underlying arbitration.

¹⁴⁵ *AKM v AKN*, para 164 read with fn 15; *AKN v ALC*, para 69.

one's case would also in Germany warrant a set aside under Sec. 1059 (2) No. 1 (b).¹⁴⁶

The second issue in this regard was whether the tribunal had acted in excess of jurisdiction when it granted the Purchasers relief in respect to their payment obligations under the Notes. This issue concerned the scope of the arbitration agreement of the APA. When determining the scope of an arbitration agreement the German courts also make their own decision without deference to the tribunal's assumption of jurisdiction.¹⁴⁷ This is because in this instance, what is at heart of the matter is not a unilateral claim by one party but the parties' joint arbitration agreement. Insofar, the German courts conduct a similar test as the Singaporean *de novo* review in that they themselves construe the scope of the arbitration agreement.¹⁴⁸ Since the APA's arbitration agreement explicitly referred disputes regarding the payment obligation to the OMNA and state court litigation, German courts would likely also have found an excess of jurisdiction. Hence, in this regard there is no difference to the Singaporean approach.

The third excess of jurisdiction concerned the assumption of jurisdiction over the Funds. In Germany, an assumption of decision-making power over third parties would be covered by Sec. 1059 (2) No. 1 (a) ZPO if there is no arbitration agreement at all. Non-signatories are only bound by an arbitration agreement if the agreement can be interpreted as also extending to them.¹⁴⁹ When the APA was concluded the Funds were not yet involved. However, they received the right to benefit under the Notes by assignment from the Secured Creditors, who were party to the APA's arbitration agreement. Under German law, an assignee can be bound to the assignor's arbitration agreement.¹⁵⁰ However, as pointed out above, the Notes were solely governed by the OMNA, and not by the APA. The OMNA does not contain an arbitration agreement. Hence, German courts would not have interpreted the arbitration agreement as extending to the Funds by way of assignment.

But they might find an excess of jurisdiction in terms of Sec. 1059 (2) No. 1 (c) ZPO in relation to the Funds' joinder. In Germany, a joinder by a

¹⁴⁶ Schlosser, above n 64, para 115.

¹⁴⁷ BGH, Decision of 13 January 2005, BGHZ 162, 9, 13; Decision of 6 June 2002, BGHZ 151, 79, 81.

¹⁴⁸ See e.g. OLG Karlsruhe, Decision of 14 September 2007, [2008] *German Arbitration Journal* 47, 48.

¹⁴⁹ Cf. Stefan Kröll, 'Commentary on § 1061 ZPO' in Karl-Heinz Böckstiegel, Stefan Kröll and Patricia Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (Kluwer Law International, 2nd ed, 2015) 442, 468.

¹⁵⁰ BGH, Decision of 3 May 2000, [2000] *Neue Juristische Wochenschrift* 2346; Decision of 2 October 1997, [1998] *Neue Juristische Wochenschrift* 371, 371 with further references.

third party requires a corresponding agreement with the disputing parties.¹⁵¹ In principle, there is nothing to prevent a party from concluding an arbitration agreement providing that only certain issues should be decided in the arbitration. The Funds and the other disputing parties did conclude such an agreement in an exchange between counsel for the Funds and counsel for the other parties. This agreement broadly stated that the Funds would “agree to be bound by the [arbitral tribunal’s] decision”.¹⁵² This means that there was a joinder agreement in place and the question of the tribunal’s jurisdiction over the Funds would be a matter of the scope of this joinder agreement. Only if this agreement excluded matters of liability would German courts confirm an excess of jurisdiction. While the Singapore Court of Appeal had declared that the agreement was restricted to the findings of the Secured Creditors’ liability, it only arrived at this conclusion after reviewing and interpreting the Funds’ substantive arguments. The agreement alone does not provide for this restriction. If one therefore considered the Funds “proper” parties to the arbitration the question of their liability would be a question of the merits of the case and would not be reviewed by German courts. Accordingly, German courts would have refrained from making the Court of Appeal’s arguments regarding the missing legal basis for the Funds’ liability and the Purchasers’ burden of proof in this regard. These are substantive questions and therefore not reviewable by German courts. However, even if one were to make this conclusion, the Funds would have lacked an opportunity to be heard regarding their liability. The first time they had been made aware that they were considered to have breached the APA was when the award was rendered.¹⁵³ Hence, in any case, German courts would have set aside the award for a violation of the right to be heard under Sec. 1059 (2) No. 1 (b).

To sum up, as regards the outcome of *AKN v ALC*, German courts would arrive at the same conclusion as the Singapore Court of Appeal to set aside certain portions of the award. However, they would take different routes in arriving at this conclusion. The first paces of their path are the same. While pointing out the importance of the right to be heard, both state courts emphasize that they will only set aside an award if a violation of this right is obvious. Likewise, both state courts re-interpret the scope of the parties’ arbitration agreement in order to determine whether the relief provided by the tribunal is within the parties’ submission to arbitration. Insofar, the German standard of review does not differ from Singapore’s *de novo* approach. However, their ways part in the following. While German courts will only re-interpret party agreements (such as the arbitration

¹⁵¹ See Siegfried H. Elsing, ‘Streitverkündung und Schiedsverfahren’ [2004] *German Arbitration Journal* 88, 92 with further references.

¹⁵² See *AKN v ALC*, para 126.

¹⁵³ *AKM v AKN*, para 273.

agreement or the terms of reference) the Singaporean courts also take into account unilateral statements (like the notice of arbitration). This practice would already be regarded a *révision au fond* by the German courts. But the Singaporean courts go even further by referencing grounds for liability and the burden of proof for these grounds when reviewing a joined party's liability. German courts would restrict their review to the existence and scope of a valid agreement to be joined. Thus, in the course of their *de novo* approach, the Singaporean courts can be said to be more willing to review matters associated with the substance of the award. This discrepancy in the standard of review leads to the fact that a set aside on the grounds used in Trojan horse challenges is less frequent in Germany.¹⁵⁴ Accordingly, the phenomenon of Trojan horse challenges has—at least to the extent evident—not yet been observed in Germany.

V. Conclusion

In set aside proceedings, Singaporean and German courts have in common that they sometimes find themselves in a conundrum between ensuring procedural fairness and due process on one hand, and protecting the finality of the arbitral award on the other. This conundrum is the breeding ground for Trojan horse challenges. The challenging parties count on the courts to solve it in favour of a close scrutiny of the arbitral process, thereby misidentifying the parties' re-characterization of their case in the arbitration as flaws of the arbitral procedure.

The success rate of such Trojan horse challenges depends on the standard of review the courts are willing to apply. This is where the difference between the Singaporean and German courts comes into play. Despite constantly emphasizing their "policy of minimal curial intervention" the Singaporean courts do appear to be willing to conduct a more thorough review of the arbitral process than the German courts. The latter appear to be more conservative in that they are less inclined to set aside an award for the grounds employed in Trojan horse challenges.

One single explanation for this discrepancy of applying the same provisions of the Model Law in different manners does not exist. However, there are certain factors that might be responsible for the differing approaches. One such factor may be the different legal traditions of Singapore and Germany. Despite the Model Law's nature as a transnational instrument the adopting states will construe its provision with their legal background and education in mind. In doing so, Singapore's common law heritage might induce a more thorough review of the arbitral tribunal's reasoning. Indeed, historically, English law provided for a rather expansive

¹⁵⁴ Cf. Stefan Kröll, 'Die Entwicklung des Schiedsrechts 2011–2012' [2013] *Neue Juristische Wochenschrift* 3135, 3139.

judicial review of the substance of awards.¹⁵⁵ While Singapore's adoption of the Model Law and the courts' constant refusal to review substantive issues means a general rejection of the English practice, it is not entirely inconceivable that this tradition still (to some degree) influences Singapore's interpretation of the Model Law.

A second factor in this regard is terminology. Whereas the civil law tradition, and German courts in particular, strictly discern between procedural and substantive issues, the common law tradition is more inclined towards a "jurisdictional approach".¹⁵⁶ This means that matters, which in civil law jurisdictions would be attributed to the substance of the case, may be regarded procedural issues in a common law jurisdiction.¹⁵⁷ This is due to the fact that common law systems traditionally approach the resolution of a conflict from an understanding of "powers" a judge or arbitrator is equipped with, whereas in the civil law tradition the adjudicator's mission is defined by the parties are entitled to under the substantive law.¹⁵⁸ These differing concepts of what is part of "the procedure" might explain the more comprehensive review by Singaporean courts.

Finally, a third, more practical factor might be the judicial set up of Singapore and Germany. The Singaporean courts are made up of exceptional experts in the field of international arbitration. This expertise naturally leads to a more thorough understanding of the arbitral process, which might automatically lead to a closer scrutiny of this process. Conversely, although the German courts are also made up of judges familiar with arbitration, they often have to deal with other commercial cases as well. They might therefore be more inclined to restrict their review to violations of due process that are plain at the face of the award.

While these factors might serve to explain some of the reasons why the courts adopt differing standards of review, the question remains which standard is preferable. The idea of having set aside provisions in the Model Law is that the parties' fundamental due process rights are safeguarded. They provide for the exception to the general rule that arbitral awards are final and binding. As is the nature of any exception to a general rule it should be construed narrowly. While the Singaporean courts do continuously reiterate their "principle of minimal curial intervention", they have developed a practice of scrutinizing the arbitral process quite comprehensively in order to determine whether they are faced with a genuine jurisdictional issue or the proverbial Trojan horse. Still, in light of

¹⁵⁵ Born, above n 42, 3347 et seq. Sec. 69 of the English Arbitration Act, 1996 still provides for the possibility of an appellate review by the English courts for substantive errors of law.

¹⁵⁶ See Schlosser, above n 64, para 116. Also cf. above, II. 3. p. 8.

¹⁵⁷ Ibid para 116 et seq.

¹⁵⁸ Ibid para 116.

this rule-exception-relationship and the general approach of the Model Law to minimize court intervention a “the less interference the better”-approach seems warranted.

This result also appears to be in line with the intention of the parties. Arbitration is, by nature, a consensual decision to receive a final and binding decision by the arbitrators that is not subject to judicial review and this decision should not be macerated in setting aside proceedings. In this regard, the decision in *AKN v ALC* is instructive. If parties are granted the freedom to choose their own arbitrators they should not be allowed to second guess their decision and seek to be bailed out by the state courts.¹⁵⁹ The very limited grounds for state court interference exist in order to maintain fundamental notions of fairness and justice. If the detection of a violation of these rights requires a sophisticated and extensive process of scrutiny there is a presumption that the right was not violated.

Indeed, there are two indications that the current Singaporean standard of review could benefit from a narrower approach. One is the sheer length judgements involving potential Trojan horse challenges amount to. They range from around 100 to almost 300 paragraphs in *AKM v AKN*, already indicating the degree of scrutiny the courts currently have to apply in order to identify a violation of procedural rights.¹⁶⁰ Another is the number of decisions that are overturned in the second instance on exactly the grounds employed in Trojan horse challenges.¹⁶¹ Indeed, in the case at hand, the court of first instance was on the one hand criticized for engaging with the merits too much and on the other, when it explicitly stated that it was not entitled to revisit the merits, was held to be not reviewing enough.

In conclusion, the decision in *AKN v ALC* has provided welcome guidance for a more restrictive approach when reviewing arbitral awards. Still, a comparison with the German approach shows that a greater focus on the divide between jurisdictional and substantive issues may allay even more concerns. The conundrum should therefore be solved in favour of the finality of awards. Regarding the perceived lack of efficiency, Singaporean commentators have already proposed a penalty in the form of costs orders for unmeritorious challenges in order to refrain parties from making Trojan horse challenges in the first place.¹⁶² Whether through such costs orders or the proposals made in this article – the Singaporean courts will benefit from a more effective way to “unveil a foul heart despite fair speech”.

¹⁵⁹ *AKN v ALC*, para 37; also cf. above II. 1. p. 5.

¹⁶⁰ See Lee, above n 8 for a comparison of the length of different judgements.

¹⁶¹ See Williams, above n 58, 173.

¹⁶² Emmanuel Chua, ‘The Singapore Approach to Allegations of Awards Infra Petita – BLC and Ors v. BLB and Anor [2014] SGCA 40’ <<http://kluwerarbitrationblog.com/blog/2014/08/26/the-singapore-approach-to-allegations-of-awards-infra-petita-blc-and-ors-v-blb-and-anor-2014-sgca-40/>> (accessed 14 June 2015); Lee, above n 8.